

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COALITION TO DEFEND AFFIRMATIVE ) Case No. 10-641 SC  
ACTION, INTEGRATION AND IMMIGRANT )  
RIGHTS AND FIGHT FOR EQUITY BY ) ORDER RE: MOTION TO  
ANY MEANS NECESSARY, et al., ) INTERVENE AND DEFENDANTS'  
) MOTIONS TO DISMISS

Plaintiffs,

v.

ARNOLD SCHWARZENNEGER, in his  
official capacity as Governor of  
the State of California, REGENTS  
OF THE UNIVERSITY OF CALIFORNIA,  
and MARK YUDOF, in his official  
capacity as President of the  
University of California,

Defendants.

---

WARD CONNERLY, AMERICAN CIVIL  
RIGHTS FOUNDATION, and CALIFORNIA  
ASSOCIATION OF SCHOLARS,

Proposed  
Intervenor-Defendants.

---

Plaintiffs Coalition to Defend Affirmative Action, et al.  
(collectively, "Plaintiffs") bring this action challenging the  
constitutionality of Section 31 of Article I of California's  
constitution ("Section 31"), as it applies to the student admission  
policies of the University of California. ECF No. 1 ("Compl.").

1 Section 31 prohibits California from granting preferential  
2 treatment to "any individual or group on the basis of race, sex,  
3 color, ethnicity, or national origin in the operation of public  
4 employment, public education, or public contracting." Cal. Const.  
5 art. I, § 31. It was added as an amendment to California's  
6 constitution in 1996 by Proposition 209, a voter initiative. See  
7 Compl. Named as Defendants are University of California President  
8 Mark Yudof ("Yudof") and the Regents of the University of  
9 California ("UC Regents") (collectively, "UC Defendants"), as well  
10 as California Governor Arnold Schwarzenegger ("the Governor"). Id.

11 This is not the first challenge to the constitutionality of  
12 Section 31 as it applies to the student admission policies of  
13 California's state-run schools. In a pre-enforcement action  
14 brought in 1996, the Ninth Circuit found Section 31 to be  
15 constitutional. Coal. for Econ. Equity v. Wilson, 122 F.3d 692  
16 (9th Cir. 1997). The Governor and UC Defendants have not brought a  
17 motion to dismiss Plaintiffs' action under Coalition for Economic  
18 Equity, however. Rather, the Governor and UC Defendants have filed  
19 separate motions arguing that under the Eleventh Amendment, they  
20 are immune from the suit and are not the proper defendants in this  
21 action. ECF Nos. 8 ("Gov.'s Mot."), 9 ("Gov.'s Mem. of P. & A."),  
22 30 ("Opp'n to Gov.'s Mot."), 33 ("Gov.'s Reply"), ("UC Defs.'  
23 Mot."), 28 ("Opp'n to UC Defs.' Mot."), 34 ("UC Defs.' Reply").  
24 The Governor argues that UC Defendants are the proper defendants,  
25 Gov.'s Mem. of P. & A. at 5, 8-9, while UC Defendants argue that  
26 the Governor is the proper defendant, UC Defs.' Mot. at 1-2.

27 Upon consideration of the parties' papers, and without  
28 expressing an opinion on the ultimate issue in the case, the Court

1 finds that both the Governor and UC President Yudof are proper  
2 defendants in this action. Neither the Governor nor Yudof are  
3 shielded by the Eleventh Amendment from defending this suit because  
4 they are both state officers sufficiently connected to the  
5 enforcement of Section 31 and because Plaintiffs seek only  
6 injunctive relief that does not implicate the state treasury. Ex  
7 parte Young, 209 U.S. 123, 156-57 (1908), Agua Caliente Band of  
8 Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000).  
9 Yudof is sufficiently connected through his role as UC President.  
10 The Governor is sufficiently connected because under California's  
11 constitution, the Governor serves as an ex officio UC regent, Cal.  
12 Const. art. IX, § 9(a), and per the UC Regents' Bylaws, the  
13 Governor serves as President of the UC Regents -- a position  
14 distinct from Yudof's position as UC President. Bylaw 21.2,  
15 Regents of Univ. of Cal. Bylaws. However, because the UC Regents  
16 is a state entity, see Cal. Const. art. IX, § 9(a), it is immune  
17 under the Eleventh Amendment from defending this suit and is  
18 dismissed as a Defendant. Pennhurst State Sch. & Hospital v.  
19 Halderman, 465 U.S. 89, 100 (1984). The Court DENIES the  
20 Governor's motion to dismiss Plaintiffs' Complaint under Rule  
21 12(b)(6) of the Federal Rules of Civil Procedure, finding that the  
22 Complaint sets forth sufficient facts to state a claim against the  
23 Governor and provides notice of this claim.

24 Also before the Court is a fully briefed Motion to Intervene  
25 as defendants, filed by Ward Connerly ("Connerly"), former UC  
26 Regent and original sponsor of Proposition 209; American Civil  
27 Rights Foundation ("ACRF"); and California Association of Scholars  
28 ("CAS") (collectively, "Proposed Intervenor"). ECF Nos. 18

("Prop. Intervenor's Mot."), 29 ("Opp'n to Prop. Intervenor's Mot."), 35 ("Prop. Intervenor's Reply & Mot. to Strike"). Proposed Intervenor's make this motion under Rules 24(a) and (b) of the Federal Rules of Civil Procedure. Proposed Intervenor's attach to this motion a draft of a motion they intend to file if they are permitted to intervene, in which they argue that Plaintiffs' case should be dismissed in light of Coalition for Economic Equity, 122 F.3d 692. Prop. Intervenor's Mot. Ex. A ("Prop. Intervenor's Draft MTD").<sup>1</sup>

The Court finds that Connerly and ACRF may intervene as Defendant-Intervenor's pursuant to Rule 24(a); Connerly and ACRF have filed a timely motion to intervene in which they assert an interest in this suit that may not be adequately represented by the Governor and the UC Defendants. Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 535, 527 (9th Cir. 1983). For these reasons, Connerly's and ACRF's motion to intervene is GRANTED. The Court DENIES CAS's motion to intervene under Rule 24(a) and (b), having found that CAS has failed to identify a substantial interest in the action.

For these reasons, the Court GRANTS IN PART and DENIES IN PART UC Defendants' Motion, DENIES the Governor's Motion, and GRANTS IN PART and DENIES IN PART Proposed Intervenor's Motion.

///

///

---

<sup>1</sup> Proposed Intervenor's have also moved to strike Plaintiffs' Opposition as untimely. Prop. Intervenor's Reply and Mot. to Strike at 1. Plaintiffs' deadline to file their Opposition was Friday, July 2, 2010, and Plaintiffs filed it the following day. See Opp'n to Prop. Intervenor's Mot. Plaintiffs have apologized for this late filing and have made assurances that no other deadlines will be missed. ECF No. 38. Although the Court does not condone untimely filings and will not tolerate future missed deadlines by the Plaintiffs, the Court finds this error to be harmless and DENIES Proposed Intervenor's Motion to Strike.

The Defendants in this action shall be:

- o ARNOLD SCHWARZENNEGER, in his official capacity as Governor of the State of California, and
- o MARK YUDOF, in his official capacity as President of the University of California.

The Defendant-Intervenors in this action shall be:

- o WARD CONNERLY, and
- o AMERICAN CIVIL RIGHTS FOUNDATION.

The Court finds that the most pressing issue in this action is whether Plaintiffs' Complaint should be dismissed under Rule 12(b)(6), given the Ninth Circuit's opinion in Coalition for Economic Equity, 122 F.3d 692. Accordingly, the Court ORDERS Defendant-Intervenors to notice and file a motion to dismiss addressing this issue. This motion shall be heard by the Court on November 15, 2010, at 10 a.m., in Courtroom 1, 450 Golden Gate Avenue, San Francisco. The Status Conference scheduled for Thursday, September 16, 2010, is VACATED.

IT IS SO ORDERED.

Dated: August 25, 2010

  
UNITED STATES DISTRICT JUDGE